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IN THE

Supreme Court of the United States

October Term, 1967
No. 524

JAMES W. CORRINGTON,

Petitioner,

vs.

JAMES E. WEBB, individually and as Joint Administrator of the National Aeronautics and Space Administration of the United States; JOHN W. MACEY, individually and as Chairman of the United States Civil Service Commission; L. J. ANDOLESK and ROBERT HAMPTON, individually and as members of the United States Civil Service Commission,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit.

LIONEL RICHMAN,
LEWIS GARRETT,
HERBERT M. ANSELL,
1336 Wilshire Boulevard,
Los Angeles, Calif. 90017,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit.

Petitioner, James W. Corrington, respectfully prays for a Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit, in order to review its judgment affirming a Judgment of Dismissal entered by the United States District Court, Southern District of California, Central Division, which said Judgment of Dismissal barred your Petitioner's application for judicial relief seeking reinstatement to his employment with the National Aeronautics and Space Administration, upon the ground that your Petitioner had been guilty of laches in filing such action.

Opinions Below.

The opinion of the United States Court of Appeals, for the Ninth Circuit, is reported at 375 F. 2d 298.

Grounds on Which the Jurisdiction of This Court Is Invoked.

I.

The date of the judgment of the United States Court of Appeals and the time of its entry is April 5, 1967.

II.

On or about June 27, 1967, your Petitioner filed with your Honorable Court his application for an order extending time to file petition for writ of certiorari. On July 12, 1967 Hon. William O. Douglas, Associate Justice of the Supreme Court of the United States, made and entered his Order extending the time for filing a petition for writ of certiorari in this cause, to and including August 19, 1967.

III.

The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. 1254(1) which provides that your Honorable Court may review decisions of the Courts of Appeal by writ of certiorari.

IV.

The action in the United States District Court was brought by Petitioner for a declaratory judgment and other equitable relief to restore him to employment with the National Aeronautics and Space Administration

of the United States and jurisdiction in that Court was evoked pursuant to Sections 1331, 1332, 2201 and 2202, of Title 28, United States Code; Section 1009 of Title 5 of the United States Code, and upon the Fifth and Sixth Amendments to the Constitution of the United States. Petitioner further invoked the Veterans Preference Act of 1944, as amended, Section 863 of Title 5 of the United States Code.

Questions Presented for Review.

I.

Did the Trial Court err in holding that the Petitioner was guilty of laches as a matter of law in delaying the filing of his action to review the administrative findings?

II.

May a finding of laches be made in the absence of any evidentiary showing of prejudice to the Respondent?

STATEMENT OF THE CASE.

I.

The Trial Court's Findings of Fact.

The trial court found, in substance, that Petitioner had been engaged as an experimental jet aircraft mechanic by the National Aeronautics and Space Administration of the United States. On March 12, 1962, he was removed from this position by direction of the personnel officer, National Aeronautics and Space Administration, Edwards Air Force Base, California. He was notified by letter dated October 1, 1962, from the Board of Appeals and Review of the Civil Service Commission that his removal from his employment had been upheld. Following this letter, no further administrative remedies were available to the Petitioner. After his removal became final, Petitioner sought the advise of an attorney. His action in the trial court below was not filed until August 13, 1965, more than 34 months after the Plaintiff's removal became final.

The Court drew as its Conclusion of Law that it had jurisdiction to review the administrative proceedings pursuant to 28 U.S.C. Section 1361 and that by not filing his complaint for review of the administrative proceeding for a period of 34 months after notification of the final decision of the Board of Appeals and Review, Petitioner was estopped as a matter of law by his laches from claiming the relief sought.

II.

Statement of the Evidence.

Petitioner's reference to this transcript are to the transcripts prepared by the United States District Court which Petitioner is advised will in turn be transmitted to your Honorable Court by the Clerk of the United States Court of Appeals for the Ninth Circuit.

Petitioner, a veteran of World War I, was employed by the National Aeronautics and Space Administration as a jet aircraft mechanic, W B 10, at Edwards Airforce Base in California, until his removal on March 12, 1962 [Tr. p. 3].

On February 8, 1962, N.A.S.A. instituted removal proceedings against Petitioner, charging him with deficiency in performance of duties, actions causing or tending to cause damage to federal property, actions endangering the safety of others and negligence [Tr. pp. 10-12].

Petitioner duly denied the charges in some detail [Tr. pp. 13-17]. However, he was advised on March 5, 1962, that a final decision had been made to remove him [Tr. pp. 18-19].

This determination was promptly appealed to the Director, Twelfth U.S. Civil Service Region, San Francisco, on March 17, 1962, and a hearing requested [Tr. p. 20].

Upon receiving notice of hearing, Petitioner designated a fellow employee as his hearing representative.

He also furnished Respondents with a list of his proposed witnesses. However, on April 20, 1962, Respondents advised Petitioner that he would be limited to five witnesses only [Tr. p. 22].

On April 22, 1962, Petitioner designated 5 witnesses whom he desired. However, feeling that these witnesses did not sufficiently rebut all of the named charges against him, on May 1, 1962, he submitted an additional designation of witnesses [Tr. pp. 23-24].

On May 8, 1962, Respondents reiterated the "five witness" limitation and refused to permit the four additional witnesses requested to be present [Tr. p. 25].

Further, in order to rebut the allegations charged in Incident No. 1, Petitioner requested that the aircraft log book be produced. This request was likewise refused [Tr. p. 5, lines 16-20].

On May 15, 1962, a hearing was held before the Civil Service Commission. On May 25, 1962, the Commissioner's San Francisco regional office made its order sustaining Petitioner's discharge [Tr. pp. 26-36]. This decision was appealed to the Commission's Board of Appeals and Review in Washington, D.C. on May 31, 1962, which affirmed the San Francisco regional office on October 1, 1962 [Tr. pp. 44-45].

Petitioner promptly consulted an attorney, William Wright, a general practitioner, in Lancaster, California. Wright agreed to look into the matter, although he had never had a similar type of problem in the past [Tr. p. 180].

After some period of time, Attorney Wright informed Petitioner that he felt it advisable that the matter be handled by a law firm in the District of Columbia

specializing in this type of litigation. He stated that, with Petitioner's permission, he would write to Congressman Everett Burkhalter, who was the member of Congress representing the Lancaster area and ask his assistance in locating a law firm handling this type of matter in Washington, D.C.

On or about October 1, 1963, he wrote to "Cap" Hardy, Congressman Burkhalter's administrative assistant in Washington. He transmitted Petitioner's file to him and asked him to locate an attorney qualified to handle the case. Petitioner was informed later that the matter had been turned over to the firm of Shipley, Ackerman & Pickett, Washington, D.C. Thereafter, at his request, Attorney Wright wrote a series of letters over a period of several years inquiring as to the status of the case. Petitioner assumed that some action had been commenced in the District of Columbia to set aside the decision of the Civil Service Commission. His problem then became complicated even more because Attorney Wright was appointed to the Municipal Court and it became difficult for Petitioner to communicate with him. After Judge Wright took the bench he suggested Petitioner communicate with his former law partner. He did this and the law partner also wrote a letter seeking the status of Petitioner's case. Finally, in June of 1965, Petitioner telephoned the Washington law firm and for the first time discovered that no action had been taken. He requested that his file be returned and it was returned to him around June 15, 1965. On July 1, 1965 he consulted Lionel Richman who then filed the instant action.

ARGUMENT.

The Finding That Appellant Was Guilty of Laches Is Contrary to Both the Evidence and the Law.

Petitioner's affidavit filed in opposition to the motion for summary judgment appears at pages 180 and 181 of the Transcript of Record. This affidavit was uncontradicted.

The affidavit indicates that Petitioner did all of those things which a reasonable and prudent layman would do to protect his rights under law. He proceeded as diligently as a layman could be expected to proceed.

In his proceedings before the Civil Service Commission he was represented by a fellow employee, one whom, we may assume, was unaware of the necessary legal action to be taken to review a decision of the Civil Service Commission.

Immediately upon receiving the decision of the Commission, he consulted an attorney in Lancaster, California. That Attorney agreed to represent Petitioner in obtaining a vindication of his rights. It is true, and the affidavit has been scrupulous in setting forth the conversation which the Petitioner had with the attorney, that what the attorney said was that he would "look into the matter to determine what my legal rights were insofar as appealing the decision of the Civil Service Commission." That attorney had never had a similar type of problem in the past.

The local attorney, behaving as a reasonable and prudent general practitioner would be expected to behave, decided to obtain the services of a specialist in the field. He sought assistance in locating a law firm in

the District of Columbia specializing in actions of this type.

He was furnished the name of such a law firm and transmitted the file to them. Then, the local practitioner became a Judge in the Municipal Court, and the problem of communication from Petitioner to his local attorney to his Washington, D.C. attorney became compounded. It was not until June of 1965 that he first discovered that no action had been filed and immediately upon receiving that advice, he consulted other counsel who filed the instant action one month later.

In selecting the United States District Court as his forum, rather than the Court of Claims, Petitioner consciously waived any claim to back wages in excess of the jurisdiction of the United States District Court, since he recognized the extent of the delay which had occurred and desired to do equity, as he sought equity.

In considering the equities here presented, the language of the United States Court of Appeals, reversing a judgment of the trial court barring relief on the ground of laches, is peculiarly appropriate. An action had been brought by a postal employee 32 months after his discharge had become final. The trial court, applying a *per se* standard, held the action barred by the doctrine of laches. The Court of Appeals reversed saying:

> "In suit for reinstatement in government employment, as in equitable actions generally, laches has two elements, (1) unreasonable delay in prosecuting a claim and (2) resulting prejudice. *Gurley v. Wilson,* 99 U.S.A.P.P.D.C. 336, 239 F 2d 975. In the present case the second element is not clearly present, and the first element is absent."
>
> *Duncan v. Summerfield,* 251 F. 2d 896, 897.

There is no showing of prejudice in the record and certainly the evidence would negative "unreasonable" delay in prosecuting the claim.

The cases which were cited by the Respondents in the Court below all have within them these two elements.

Nicholas v. United States, 257 U.S. 7 involved an action brought three years after removal from office, but with no objection to the removal having been made prior to suit.

Norris v. United States, 257 U.S. 77 involved an action brought eleven months after removal from office, the Court stating ". . . but no fact is found explaining his failure to assert his right to the office, or its emoluments, for the period of eleven months and a little over." (page 80.) In addition, the Court noted that the office had been abolished in the interim.

Arant v. Lane, 249 U.S. 367, 371-372 involved a discharge without the bringing of formal charges and a delay of twenty months prior to the filing of the action. The Court stated that the delay, when *unexplained,* results in application of the doctrine of laches.

United States v. Wickersham, 201 U.S. 390 also involved a wrongful discharge without the bringing of charges. Two months later the employee demanded his salary but did not bring suit for four and a half years without explaining his delay.

Chappelle v. Sharpe, 301 F. 2d 506, 507 involved a delay of 34½ months before the bringing of the ac-

tion. The Court noted, "the defendant officials moved to dismiss, filing in support an affidavit reciting facts which upon their face, pose the problem of laches." In this case, no problem of laches has been posed by the record.

Morse v. United States, 59 Ct. Cl. 139, involved the delay of over thirteen months before the filing of a petition with the only reason for the delay being Appellant had "experienced much uneasiness over the possiblity of his reinstatement in the service and his immediate removal therefrom in accordance with the Civil Service law." In the absence of any explanation of the delay, the petition was dismissed.

It is of some significance to examine the case of *Duncan v. Summerfield* insofar as its subsequent history is concerned, to determine whether its statement of law is still valid.

In *Duncan v. Summerfield,* Chief Judge Edgerton with Judge Bazelon joined in the majority opinion. Judge Miller dissented, without opinion.

In *Tucker v. Summerfield,* 251 F. 2d 898, decided by the same circuit, Judge Edgerton and Bazelon again affirmed their position taken in *Duncan v. Summerfield,* with Judge Bastian dissenting, without opinion.

In 1959, the same Circuit decided *Jones v. Summerfield,* 265 F. 2d 124, wherein a panel of that court consisting of Judges Edgerton, Washington and Bastion affirmed a judgment of dismissal on the gound of

laches, but restating the doctrine of *Duncan v. Summerfield* and holding that the appellant did not meet its standards.

In *Evans v. Leedon*, 265 F. 2d 125, a panel consisting of Judges Prettyman, Washington and Danaher likewise affirmed a judgment of dismissal on the ground of laches but again restating *Duncan v. Summerfield* and holding that the appellant had failed to meet its standards.

Finally, the same Circuit decided *Powell v. Zuckert*, 366 F. 2d 634, with Judges Danaher, Wright and Leventhal unanimously joining in restating *Duncan v. Summerfield* and weighing the showing before them against the standards of *Duncan v. Summerfield.*

The instant case represents a substantial departure from all the cases cited above. There is not a scintilla of evidence offered on behalf of the Respondents that they had suffered any prejudice whatsoever. In the absence of such a showing of prejudice there cannot be a finding of laches.

Conclusion.

Considering the work classification of Petitioner, it is obvious that there could be no showing of prejudice to Respondents except insofar as the question of back pay is concerned. Petitioner has from the outset stipulated to an equitable remittitur of any portion of the back wages found to be attributable to delay. Petitioner's delay not only is not unreasonable but represent-

ed the best efforts by a layman to seek relief as expeditiously as a layman can obtain it.

The *per curiam* decision of the Court of Appeals considering that Respondents offered no evidence to show laches, represents a radical departure from established law and requires review by your Honorable Court.

For these reasons, therefore, it is respectfully submitted that a substantial question of federal law exists requiring settlement by your Honorable Court and that a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LIONEL RICHMAN,
LEWIS GARRETT,
HERBERT M. ANSELL,
By LIONEL RICHMAN,
HERBERT M. ANSELL,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 524

JAMES W. CORRINGTON, PETITIONER

v.

JAMES E. WEBB, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which show that the petition was filed out of time.

On April 5, 1967, the Court of Appeals for the Ninth Circuit affirmed the district court's judgment dismissing petitioner's action. On June 27, 1967, petitioner filed his application for an order extending the time within which to file a petition for a writ of certiorari. On July 12, 1967, Mr. Justice Douglas

extended the time to and including August 19, 1967. The petition was filed on August 21, 1967, which was not within the time as extended.

Section 2101(c) of Title 28 provides that a party seeking a writ of certiorari to review a judgment or decree in a civil action must apply for the writ within ninety days after entry of such judgment or decree, unless the time is extended by a Justice of this Court. Since the petition was not filed within the jurisdictional limits as enlarged, the petition should be denied as untimely.

Respectfully submitted,

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967

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